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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1957

No. 696

THILLENS, INC., a corporation,

Appellant,

v.

LLOYD MOREY, Auditor of Public Accounts of the State of Illinois; Latham Castle, Attorney General of the State of Illinois; John Gutknecht, State's Attorney of Cook County, Illinois,

Appellees, and

HAROLD A. ARNOLD, doing business as LAKEVIEW CURRENCY EXCHANGE; RALPH BARR and LOUIS WOLFBERG, copartners doing business as MARSHALL SQUARE CURRENCY EXCHANGE; JOHN F. BOGIE, doing business as RAVENSWOOD CURRENCY EXCHANGE, and SIDNEY SORKIN, doing business as CERTIFIED CURRENCY EXCHANGE,

Appellees.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

MOTION OF ELBERT S. SMITH, AUDITOR OF PUBLIC ACCOUNTS OF THE STATE OF ILLINOIS, AND LATHAM CASTLE, ATTORNEY GENERAL OF THE STATE OF ILLINOIS, TO DISMISS OR AFFIRM.

LATHAM CASTLE,
Attorney General of the State of Illinois,
160 N. La Salle St., Suite 900,
Chicago 1, Illinois 60609,
Attorney for Appellee State Officers.

WILLIAM C. WINES,
BEN SCHWARTZ,
Assistant Attorneys General,
Of Counsel.

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Appellees, Elbert S. Smith, Auditor of Public Accounts of the State of Illinois, and Latham Castle, Attorney General of the State of Illinois, move that this appeal be dismissed on the ground that it does not present a substantial Federal question, or in the alternative, that the judgment of the Supreme Court of Illinois be affirmed because the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

LATHAM CASTLE,
Attorney General of Illinois,
Attorney for Appellee State Officers.

REFERENCE TO AND ADOPTION OF OTHER APPELLEES' MOTION TO DISMISS OR AFFIRM.

We have been privileged to read the motion of appellees Arnold, Barr and Wolfberg, Bogie and Sorkin, to dismiss or affirm. The Auditor and the Attorney General of the State of Illinois adopt the considerations urged in that motion.

However, it is the view of the Attorney General that other important grounds for dismissal or affirmance exist, which grounds are not mentioned or are not fully developed in the motion of the other appellees. These grounds are presented in support of the motion of the appellee State officers.

SUGGESTIONS IN SUPPORT OF THIS MOTION TO DISMISS OR AFFIRM.

I.

The Federal questions tendered by this appeal are not substantial and do not need further argument.

Section .01 of The Community Currency Exchange Act of 1943, as amended in 1951 (Ill. Rev. Stat. 1957, Ch. 16½, Pars. 30-56.3, Vol. I, pp. 277-291), is as follows:

Sec. .01. The General Assembly has found and declares:

that the community currency exchange business, as hereinafter defined in Section 1, has become so widespread since the bank holiday in 1933, and so extensively and intimately integrated with the financial institutions of this State that it is affected with a public interest and should be licensed and regulated as a business affecting the convenience, general welfare, and economic interest of the people of this State;

that no community currency exchange should be operated without a license, or otherwise than in accordance with the regulations provided in, or to be provided pursuant to this Act;

that the number of community currency exchanges should be limited in accordance with the needs of the communities they are to serve, and in accordance with the provisions of this Act;

that there has arisen also the ambulatory currency exchange business, as hereinafter defined in Section 1, which has engaged heretofore in unlicensed competition with the licensed community currency exchange business;

that it is in the public interest to promote and foster the community currency exchange business and to assure the financial stability thereof;

that the operations of the ambulatory currency exchange business have enabled it to appropriate the most profitable function of the community currency exchange business without incurring the expenses of, or subjecting itself to the regulations imposed upon the community currency exchange business, and to secure thereby an unfair advantage; that there has resulted therefrom an unfair and ruinous competition to the licensed community currency exchange business;

that the nature of the ambulatory currency exchange business is such as to render it hazardous and dangerous to the public safety and security;

that the public welfare demands that no ambulatory currency exchange business should be operated without a license, or otherwise than in accordance with the regulations provided in, or to be provided pursuant to this Act.

(Ill. Rev. Stat. 1957, Ch. 16½, Par. 30, Vol. I, p. 277.) (Emphasis supplied.)

The Supreme Court of Illinois has thus succinctly and correctly delineated the reasons for the constitutionality of the measure now under attack in its opinion in the instant case (*Appellant's Jurisdictional Statement*, p. 31-a, 11 Ill. 2d p. 579, 144 N. E. 2d at p. 735).

> "As stated in the case of *Thiltens, Inc.* v. *Hodge*, all presumptions are in favor of the constitutionality of legislation once it becomes the law of the State, and all reasonable doubts must be resolved in its favor. The party attacking the validity of a statute has the burden of proving that it is clearly arbitrary and has no foundation in the police power for its existence. Where the reasonableness of the legislation is fairly debatable the courts will not interfere with the legislative judgment and will not substitute their judgment for that of the legislative department. Such principle does not foreclose the courts from exercising their judicial function, and it is true that the reasonableness and propriety of

regulation and its application must be decided by the court from the facts and circumstances in evidence. *Midland Electric Coal Corp.* v. *County of Knox*, 1 Ill. 2d 200, 115 N. E. 2d 275. However, the trial court has no power to judge in accordance with its judgment on conflicting evidence but its duty is only to decide whether the question is fairly debatable. If fairly debatable it should not investigate further. *Gadlin* v. *Auditor of Public Accounts*, 414 Ill. 89, 110 N. E. 2d 234. It makes no difference that substantial evidence on both sides may be in conflict or that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not for the courts to arbitrate in such contradictions of evidence. *Stewart* v. *Brady*, 300 Ill. 425, 133 N. E. 310; *Rams-Head Co.* v. *City of Des Plaines*, 9 Ill. 2d 326, 137 N. E. 2d 259; *City of West Frankfort* v. *Fullop*, 6 Ill. 2d 609, 129 N. E. 2d 682. From the findings of fact specifically made by the trial court that the plaintiff cashed checks on the public streets while engaged in promotional services, that there have been holdups in which individuals have been injured, that there is no armed guard other than the armed cashier himself when cashing checks outside of an armored truck, that there is competition between the plaintiff and currency exchanges and that plaintiff charges uniformly less than the rates charged by currency exchange operators, that plaintiff's business concerns itself only with the most profitable function of community currency exchange business, and from other facts in evidence whereby it appears that the plaintiff itself recognizes the element of public danger from its operations by carrying very large insurance policies indemnifying the public against loss from holdup, and by the extensive protection furnished its own employees and its property, the use of armored cars, extensive firearm training, and advance notification of police as to its routes and cashing operations, there seems to be ample evidence from which the legislature could reasonably conclude that the plaintiff's operation directly affected the public safety and the use of public highways. From the facts before the court it seems amply clear that the legislature was not unreasonable, arbitrary or capricious in determining that the nature of the plaintiff's business was such as to render it hazard-

ous and dangerous to the public safety and security, warranting police regulations."

The Act now under attack declares and enacts the considered and deliberate policy of the State of Illinois with respect to ambulatory or mobile currency exchanges in their relation to exchanges operated at a fixed location. That policy may be thus fairly summarized:

Currency exchanges in general in Illinois furnish services for the cashing of checks at a moderate fee. This, so the General Assembly recognizes, is the most profitable services of such exchanges.

But such exchanges also furnish other services that in language of the General Assembly are "so extensively and intimately integrated with the financial institutions of this State" that the business "is affected with a public interest." These services include the sale of money orders and the remittance of funds in payment of public utility and other bills. Currency exchanges thus in effect function as depositaries of the public's money; for while the money orders are outstanding and the items of remittance of public utility bills are in transit, the proprietor of the exchange, individual or corporate, has on hand huge sums of money held for the redemption of the money orders and the payment of the utility bills.

It is easy to see that either defalcation by the proprietor of the exchange or an employee, robbery or burglary may have the consequence of a public disaster involving hundreds of persons and thousands of dollars.

To be sure, appellant does not itself vend money orders or act as a remittance agency for the payment of public utility bills. But it competes with the cashing of checks with those exchanges that not only cash checks but perform these other important services involving the fiduciary redemption and disbursement of vast sums of money.

In the language of the Legislature quoted from Section .01 of the Act above, the ambulatory currency exchange business, engaged in "heretofore unlicensed competition with the licensed community currency exchange business," has been enabled "to appropriate the most profitable function of the community currency exchange business without incurring the expenses of, or subjecting itself to the regulations imposed upon the community currency exchange business, and to secure thereby an unfair advantage." Declaring that "it is in the public interest to promote and foster the community currency exchange business and to assure the financial stability thereof," the General Assembly has enacted the instant legislation.

The Attorney General of Illinois earnestly suggests that once the reasons for and the *rationale* of the present measure are appreciated, it is clear that appellant's challenge of the present Act "does not present a substantial Federal question" and "it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument."

It is *not true* that the enforcement of the instant Act will expel appellant from the business of cashing checks. Appellant's own impressive demonstration of the highly profitable business that it has built up, beginning with only one truck and now serving a very large segment of Chicago, is the best possible proof that the Act will not be confiscatory.

Nor is there any substance to appellant's charge that the community currency exchanges enjoy a "monopoly" of the business of cashing checks. On the contrary, appellant's business verges far more nearly on monopoly than does that of any community currency exchange.

Appellant asserts the existence of a claimed "exemption" of concerns which, like Brinks' Express, transport an em-

ployer's money for the meeting of payrolls. The Supreme Court of Illinois thus dealt with this contention of appellant.

> "The exemptions complained of refer to businesses not primarily engaged in currency exchange or check cashing, but refer to businesses whose primary business is something different, viz., the transportation of another's valuables for hire, or retail sales. In each type of exempted business it is recognized that incidentally checks may be cashed. Under the applicable rules, however, we must conclude that the legislature exempted from the application of the act certain businesses with different characteristics predicated upon a reasonable belief that the evils at which the statute was directed did not exist in sufficient degree in the exempted classes to warrant regulation. From the facts introduced in evidence, we cannot say the legislature acted arbitrarily or unreasonably in providing the exemptions attacked."

None of these other business concerns is exempted by name. The Act is merely inapplicable to them.

II.

"The Question of the Effect of the Decision in the Morey v. Doud Case Upon the Act in Question" Is a Question of State Law.

Appellant suggests that in *Morey* v. *Doud*, 354 U. S. 475, the Court held invalid the entire Illinois Currency Exchange Act and that therefore "there was nothing left for the Legislature of Illinois to amend (See H. B. 1031, Appendix B); or for the Supreme Court of Illinois to adjudicate."

Morey v. *Doud* held invalid the exemption of the American Express Company from the Illinois Community Currency Exchange Act and therefore held the Act unconstitutional as to the plaintiffs in that case.

Subsequently to the impact of this Court's decision in the *Morey* case the General Assembly *deleted* the exemption of the American Express Company from the Act. This appears from Illinois House Bill 1031, reproduced in full in Appellant's Jurisdictional Statement, at page 41-a, and from the text in the compiled edition of the Illinois statutes (Ill. Rev. Stat. 1957, Ch. 16½, Par. 31, Vol. I, p. 278).

In its opinion in the instant case the Supreme Court of Illinois has recognized the Act as subsisting after the amendment deleting the exemption of the American Express Company and has held that exemption severable. The Court says in its opinion (*Appellant's Jurisdictional Statement*, p-36-a, 11 Ill. 2d at p. 597):

> "We must accept such amendatory act as a positive and irrebuttable indication that the Illinois legislature would have passed the Currency Exchange Act even though the named companies were subject to its application, notwithstanding this court's prior *dicta* in the *McDougall* case. Such being the fact, such exemption clause should be considered severable (*Myers* v. *Krajefska*, 8 Ill. 2d 322) with no effect on the validity of the remainder of the Currency Exchange Act even though such clause is invalid under the United States Supreme Court decision in the *Morey* case."

The Illinois rule is that the amendment of legislation removing discriminatory provisions cures any vice that might have inhered in the original act. *Abbate Bros., Inc.* v. *City of Chicago*, 11 Ill. 2d 337.

The Illinois rule is further that legislation unconstitutional at the time of its enactment may become constitutional without reenactment by a change in the circumstances that are the subject of the act. *Albers* v. *Lamson*, 380 Ill. 35.

Since the Supreme Court of Illinois has recognized the Currency Exchange Act as now subsisting as amended de-

spite *Morey* v. *Doud*, 354 U. S. 457, that is an end of the matter.

Appellant's suggestion that there is no Illinois legislation subject to amendment tenders only a question of State law that has been resolved by the Supreme Court of Illinois.

Conclusion.

For the reasons set forth above, it is respectfully submitted that this appeal should be dismissed or that the judgment of the Supreme Court of Illinois should be affirmed without further argument.

Respectfully submitted,

LATHAM CASTLE,
Attorney General of the State of Illinois,
160 N. La Salle St., Suite 900,
Chicago 1, (FIn. 6-2000),
Attorney for Appellee State Officers.

WILLIAM C. WINES,
BEN SCHWARTZ,
Assistant Attorneys General,
Of counsel.